ATTORNEYS FOR APPELLANT:

**SUSAN CARPENTER**
Public Defender of Indiana

**JONATHAN O. CHENOWETH**
Deputy Public Defender
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**
Attorney General of Indiana

**ZACHARY J. STOCK**
Deputy Attorney General
Indianapolis, Indiana

# IN THE
# COURT OF APPEALS OF INDIANA

| | | |
|---|---|---|
| DONALD ADKINS, | ) | |
| | ) | |
| Appellant-Petitioner, | ) | |
| | ) | |
| vs. | ) | No. 11A01-0702-PC-85 |
| | ) | |
| STATE OF INDIANA, | ) | |
| | ) | |
| Appellee-Respondent. | ) | |

APPEAL FROM THE CLAY CIRCUIT COURT
The Honorable Robert A. Pell, Judge
Cause No. 11C01-0003-CF-39

**June 27, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARNES, Judge**

## Case Summary

Donald Adkins appeals the denial of his petition for post-conviction relief ("PCR petition"), which challenged his convictions for Class D felony possession of a schedule II controlled substance, two counts of Class D felony receiving stolen property, and two counts of Class C felony corrupt business influence, as well as the finding that he is an habitual offender. We affirm in part and reverse in part.

## Issues

The issues before us are:

I. whether Adkins received the effective assistance of trial counsel; and

II. whether he received the effective assistance of appellate counsel.

## Facts

On March 24, 2000, police executed a search warrant at Adkins's residence and garage. In the garage, where Adkins operated a motorcycle repair business, they found three glass containers with liquid methamphetamine in them along with other indicia of methamphetamine manufacturing. Other persons besides Adkins evidently also had access to the garage. In Adkins's residence, police found items of property that had been reported stolen in the summer of 1999, including a laser transit belonging to Diamond Equipment and various items of personal property, including novelty cookie jars, belonging to a woman named Jonnie Grittner. Police also recovered a "rock" of methamphetamine inside the residence and powder on Adkins's pants that turned out to be methamphetamine. Outside on the ground police found an engine casing from a

motorcycle Barton Bingham had reported that stolen in 1993. The vehicle identification number had been removed from the casing.

The State charged Adkins with multiple counts, including one count of Class B felony manufacturing a schedule II controlled substance (methamphetamine), one count of Class D felony possession of a schedule II controlled substance (methamphetamine), two counts of Class D felony possession of stolen property, and two counts of Class C felony corrupt business influence, a/k/a racketeer influenced and corrupt organizations charges ("RICO charges"). The State also alleged that Adkins was an habitual offender for having two prior unrelated felony convictions, a 1976 conviction for burglary and a 1982 conviction for theft.[1] After a jury trial at which Adkins was represented by counsel, he was convicted of these counts and found to be an habitual offender. The trial court sentenced him to an aggregate term of fifty years. On direct appeal, appellate counsel—who was the same as trial counsel—only challenged Adkins's conviction for Class B felony manufacturing a schedule II controlled substance on the basis of an allegedly erroneous evidentiary ruling. We rejected this argument and affirmed the conviction. See Adkins v. State, No. 11A01-0012-CR-438 (Ind. Ct. App. Aug. 31, 2001). No petition to transfer was filed.

On September 11, 2002, Adkins filed a pro se PCR petition, which later was amended by counsel. As amended, the PCR petition alleged that Adkins's trial counsel was ineffective for the following reasons: for failing to object to incorrect jury

[1] Adkins also was charged with several other crimes, none of which are relevant to this PCR appeal.

instructions on the receiving stolen property charges and the habitual offender allegation and for failing to move for dismissal or a directed verdict at the close of the State's evidence on the receiving stolen property and RICO charges. The PCR petition also alleged that appellate counsel was ineffective for failing to argue that his convictions for both manufacturing a schedule II controlled substance and possessing a schedule II controlled substance violated lesser included offense principles and for failing to argue that Adkins's receiving stolen property and RICO convictions were not supported by sufficient evidence. On December 28, 2006, the post-conviction court denied the PCR petition in full. Adkins now appeals.

**Analysis**

When reviewing the judgment of a post-conviction court, we consider only the evidence and reasonable inferences supporting its judgment. Hall v. State, 849 N.E.2d 466, 468 (Ind. 2006). "The post-conviction court is the sole judge of the evidence and the credibility of the witnesses." Id. at 468-69. "To prevail on appeal from denial of post-conviction relief, the petitioner must show that the evidence as a whole leads unerringly and unmistakably to a conclusion opposite to that reached by the post-conviction court." Id. at 469. Where, as here, the post-conviction court enters findings and conclusions in accordance with Indiana Post-Conviction Rule (1)(6), we will reverse only upon a showing of clear error, which only occurs if we are left with a definite and firm conviction that a mistake has been made. Id. "Only where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the

opposite conclusion, will its findings or conclusions be disturbed as being contrary to law." Id.

### *I. Ineffective Assistance of Trial Counsel*

Claims of ineffective assistance of counsel are reviewed under the two-part test announced in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006). A defendant must demonstrate both that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Id. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. (quoting Strickland, 466 U.S. at 694, 104 S. Ct. at 2068). A reasonable probability arises if confidence in the outcome of the trial is undermined. Id.

"We presume that counsel provided adequate assistance and defer to counsel's strategic and tactical decisions." Terry v. State, 857 N.E.2d 396, 403 (Ind. Ct. App. 2006), trans. denied. Whether a lawyer performed reasonably under the circumstances is determined by examining the whole of the lawyer's work on a case. Oliver v. State, 843 N.E.2d 581, 591 (Ind. Ct. App. 2006), trans. denied. "A defendant must offer strong and convincing evidence to overcome the presumption that counsel prepared and executed an effective defense." Id. "The purpose of an ineffective assistance of counsel claim is not to critique counsel's performance, and isolated omissions or errors and bad tactics do not necessarily mean that representation was ineffective." Grinstead, 845 N.E.2d at 1036.

### *A. Failure to Move for Directed Verdict*

Adkins contends trial counsel, at the conclusion of the State's case-in-chief, should have moved for a directed verdict or judgment on the evidence on the receiving stolen property and corrupt business influence counts. We note that the State only has to present a prima facie case to avoid judgment on the evidence. Jones v. State, 697 N.E.2d 57, 59 (Ind. 1998). "It need not show that every reasonable doubt has been overcome." Dunville v. State, 271 Ind. 393, 399, 393 N.E.2d 143, 147 (1979). Thus, the State's burden in surviving a direct verdict motion is relatively slight. Additionally, it has been held generally that "failure of trial counsel to move for a directed verdict does not create sufficient prejudice to result in a finding of ineffective assistance of counsel." Siglar v. State, 541 N.E.2d 944, 948 (Ind. 1989). Finally, trial counsel testified at the PCR hearing that, based on his personal experience with the trial judge, he saw little chance of success for a directed verdict motion. Based on all of these factors, trial counsel's decision not to move for a directed verdict or for judgment on the evidence was a reasonable strategic decision and did not constitute ineffective assistance.

### *B. Failure to Object to Receiving Stolen Property Jury Instructions*

Next, Adkins contends trial counsel was ineffective for not objecting to the following instruction, final instruction nine, defining the crime of receiving stolen property for the jury:

> The crime of receiving stolen property is defined by statute as follows:

> A person who knowing or intentionally retains the property of another person that has been the subject of a theft commits receiving stolen property, a Class D felony.
>
> To convict the defendant, the State must have proved each of the following elements:
>
> The defendant
>
> 1. knowingly or intentionally
>
> 2. retained property of Jonnie Grittner, John Borland and or Barton Bingham
>
> 3. which property had been the subject of theft.
>
> If the State failed to prove each of these elements beyond a reasonable doubt, you should find the defendant not guilty.
>
> If the State did prove each of these elements beyond a reasonable doubt, you should find the defendant guilty of receiving stolen property, a Class D Felony.

Trial R. p. 99. Adkins specifically contends this instruction failed to adequately advise the jury that it had to find Adkins knew the property was stolen before it could convict him of receiving stolen property.

It is true that in order to convict a defendant of receiving stolen property, the State must prove beyond a reasonable doubt that the defendant knew that the property had been the subject of theft. See Gibson v. State, 643 N.E.2d 885, 887 (Ind. 1994). Arguably, final instruction nine did not directly inform the jury that it had to find Adkins knew the property was stolen. However, such can be implied from the wording of the instruction, and Adkins has not cited to any case holding that an instruction such as final instruction nine is erroneous.

Furthermore, at the time of Adkins's trial this was the pattern jury instruction for receiving stolen property. See Ind. Pattern Jury Instruction (Criminal) 4.37 (2nd ed. 1991). Additionally, this instruction directly parallels the language of the receiving stolen property statute, which does not expressly state that the defendant must have known the property was stolen. See Ind. Code § 35-43-4-2(b). It is true that in the latest version of the pattern instructions, language has been added to explicitly advise the jury that the State must prove the "Defendant knew the property had been the subject of a theft . . . ." See Ind. Pattern Jury Instruction (Criminal) 4.37 (3rd ed. 2006). Regardless, we cannot say trial counsel performed below an objective standard of reasonableness for not objecting to what was the pattern jury instruction at the time of trial, and which instruction paralleled the express language of the receiving stolen property statute, and which had not been disapproved by an appellate court. Trial counsel was not ineffective on this point.

### *C. Failure to Object to Habitual Offender Instruction*

Adkins's final claim regarding the effectiveness of trial counsel is that counsel should have objected to an instruction concerning the habitual offender charge, which informed the jury that if it found Adkins had two prior unrelated felony convictions, then it "should" find him to be an habitual offender. Trial R. p. 87. Adkins is correct that it is erroneous to instruct a jury that they "should" find a defendant to be an habitual offender if it finds that he or she has two prior unrelated felony convictions. See Parker v. State, 698 N.E.2d 737, 742 (Ind. 1998). This is because a jury is free, under Article 1, Section

19 of the Indiana Constitution, to find a defendant not to be an habitual offender "irrespective of the uncontroverted proof of prior felonies." Seay v. State, 698 N.E.2d 732, 737 (Ind. 1998). The pattern jury instruction at the time of Adkins's trial correctly stated that a jury "may," as opposed to "should," find a defendant to be an habitual offender if he or she has two prior unrelated felonies. See Ind. Pattern Jury Instruction (Criminal) 15.19 (2nd ed. 1999 supp.). Given this pattern jury instruction and the clear state of the law at the time of Adkins's trial in 2000, trial counsel's failure to object to the given instruction fell below an objective standard of reasonableness.

This does not necessarily mean counsel's performance was constitutionally deficient, however. In Seay, our supreme court summarily affirmed this court's conclusion that regardless of the erroneous habitual offender instruction, trial counsel was not ineffective for failing to object to the instruction, and also that the instruction was not fundamentally erroneous. See Seay, 698 N.E.2d at 737 (citing Seay v. State, 673 N.E.2d 475, 480-81 (Ind. Ct. App. 1996)). Additionally, in Parker the court held that ordinary reversible error "does not necessarily occur when the type of instruction provided in this case is accompanied by another instruction informing the jury that it is the judge of the law and the facts." Parker, 698 N.E.2d at 742.

Here, the jury was given both a preliminary and final instruction during the guilt phase of the trial that it was "given the right to decide both the law and the facts." Tr. R. pp. 58, 92. At the commencement of the habitual offender proceeding, the jury was instructed that both the preliminary and final instructions it had received during the guilt phase also applied during the habitual offender phase. When the trial court received a

note during the habitual offender deliberations reading, "I have 2 jurors that do not agree with the law," the trial court advised the jury to refer to all the instructions it had received. Id. at 126. Thus, at this point, assuming the jury followed the trial court's advice, it would have been reminded that it was the judge of both the law and the facts in the case. We believe this was sufficient to reduce any prejudice caused by the erroneous habitual offender instruction such that our confidence in the validity of Adkins's habitual offender finding is not undermined, as required to establish that trial counsel's performance was constitutionally inadequate. This is especially true, given that Adkins does not in any way challenge the fact that he indeed has two prior unrelated felony convictions. In sum, trial counsel's performance on this issue was not ineffective.

### *II. Ineffective Assistance of Appellate Counsel*

As with claims of ineffectiveness of trial counsel, a defendant claiming ineffective assistance of appellate counsel must show that counsel was deficient in his or her performance and that the deficiency resulted in prejudice. Hopkins v. State, 841 N.E.2d 608, 611 (Ind. Ct. App. 2006) (quoting Fisher v. State, 810 N.E.2d 674, 676-77 (Ind. 2004)). Ineffective assistance of appellate counsel claims generally fall into three basic categories: (1) denial of access to an appeal; (2) waiver of issues; and (3) failure to present issues well. Id.

Adkins's specific claim here concerns waiver of issues, or not presenting certain issues at all on direct appeal. Regarding this type of claim, our supreme court has stated:

> As for challenges to an appellate counsel's strategic decision to include or exclude issues, courts should be particularly deferential "unless such a decision was unquestionably

> unreasonable." To prevail on a claim of ineffective assistance of appellate counsel, a defendant must "show from the information available in the trial record or otherwise known to appellate counsel that appellate counsel failed to present a significant and obvious issue and that this failure cannot be explained by any reasonable strategy." Deciding which issues to raise on appeal is one of the most important strategic decisions of appellate counsel. Appellate counsel is not deficient if the decision to present "some issues over others was reasonable in light of the facts of the case and the precedent available to counsel when that choice was made." Even if counsel's choice is not reasonable, to prevail, petitioner must demonstrate a reasonable probability that the outcome of the direct appeal would have been different.

Stevens v. State, 770 N.E.2d 739, 760 (Ind. 2002) (citations omitted), cert. denied.

### *A. Lesser-Included Offense*

Adkins first argues that appellate counsel should have argued that Class D felony possession of a schedule II controlled substance (methamphetamine) was a lesser-included offense of Class B felony manufacturing of a schedule II controlled substance (methamphetamine) and it was improper for him to be convicted of both offenses. Adkins's argument is based upon Indiana Code Section 35-38-1-6, which provides that if a defendant is charged with an offense and an included offense in separate counts and is found guilty of both counts, "judgment and sentence may not be entered against the defendant for the included offense." Indiana Code Section 35-41-1-16 states:

> "Included offense" means an offense that:
>
> (1) is established by proof of the same material elements or less than all the material elements required to establish the commission of the offense charged;
>
> (2) consists of an attempt to commit the offense charged or an offense otherwise included therein; or

> (3) differs from the offense charged only in the respect that a less serious harm or risk of harm to the same person, property, or public interest, or a lesser kind of culpability, is required to establish its commission.

"A lesser included offense is necessarily included within the greater offense if it is impossible to commit the greater offense without first having committed the lesser." Iddings v. State, 772 N.E.2d 1006, 1016 (Ind. Ct. App. 2002), trans. denied. "If the evidence indicates that one crime is independent of another crime, it is not an included offense." Id. at 1017. "[W]hether an offense is included in another within the meaning of Section 35-38-1-6 requires careful examination of the facts and circumstances of each particular case." Id. Additionally, it has been held that separate convictions for dealing and possession of a controlled substance are sustainable if the dealing and possession charges are specifically based on distinct, respective quantities of the drug. Johnson v. State, 659 N.E.2d 242, 245 (Ind. Ct. App. 1995). Possession of the drug is not a lesser included offense of dealing in that situation. See id.

The charging information here did not make a distinction between what methamphetamine was being used to support the manufacturing charge and what was being used to support the simple possession charge. However, the evidence at trial clearly demonstrated that a significant amount of methamphetamine was discovered in Adkins's garage in a manufacturing setting, and that some methamphetamine was discovered separately in Adkins's residence and on his pants. Although the arguments of counsel were not transcribed, we can gather from the transcript that the State presented the methamphetamine found in the garage as supporting the manufacturing charge and

the evidence found in the residence and on Adkins's person as supporting the possession charge. At trial, the prosecutor specifically stated during examination of a witness, "Count 3 is merely the possession of methamphetamine. Did you analyze the methamphetamine that was from the kitchen cupboard on the plate and found that to be methamphetamine?" Tr. R. p. 432. The witness responded that it was.

We conclude appellate counsel acted reasonably in not pressing this alleged lesser included offense claim. The evidence reveals the State attempted to differentiate the methamphetamine found in the garage from the methamphetamine found on or near Adkins's person in the residence. Separate convictions for both manufacturing and possession of methamphetamine are permissible in such a scenario. See Johnson, 659 N.E.2d at 245-46. Appellate counsel was not ineffective on this issue.

### *B. Sufficiency of the Evidence*

Adkins's final argument is that appellate counsel was ineffective for failing to argue that there was insufficient evidence to support his convictions for two counts of receiving stolen property and two RICO counts. We note at the outset that this court is required to be deferential to the finder of fact when considering whether there is sufficient evidence to support a conviction. In reviewing a claim of insufficient evidence, we must consider only the evidence most favorable to the verdict and any reasonable inferences that may be drawn from that evidence. Freshwater v. State, 853 N.E.2d 941, 942 (Ind. 2006). We neither reweigh the evidence nor judge the credibility of witnesses. Trimble v. State, 848 N.E.2d 278, 279 (Ind. 2006). If there is sufficient evidence of probative value to support the conclusion of the trier of fact, then the verdict will not be

disturbed. Id. Given this highly deferential standard of review, we believe a defendant who claims appellate counsel was ineffective for not making a sufficiency of the evidence argument on direct appeal faces a difficult burden.

In order to convict Adkins of receiving stolen property, the State was required to prove he knowingly or intentionally received, retained, or disposed of the property of another person that has been the subject of theft. See Barnett v. State, 834 N.E.2d 169, 172 (Ind. Ct. App. 2005) (citing I.C. § 35-43-4-2(b)). "Knowledge that property is stolen may be inferred from the circumstances surrounding the possession." Bennett v. State, 787 N.E.2d 938, 946 (Ind. Ct. App. 2003), trans. denied. "Possession of recently stolen property when joined with attempts at concealment, evasive or false statements, or an unusual manner of acquisition may be sufficient evidence of knowledge that the property was stolen." Purifoy v. State, 821 N.E.2d 409, 414 (Ind. Ct. App. 2005), trans. denied.

Adkins principally claims there was insufficient evidence that he knew the furniture and cookie jars belonging to Grittner and the laser transit belonging to Diamond Equipment were stolen. We emphasize that we do not have to analyze the sufficiency of the evidence in this case with the same degree of thoroughness as if the issue was being presented on direct appeal; otherwise, there would be no meaningful difference between direct appeals and PCR petitions claiming ineffective assistance of counsel, and a PCR proceeding is not meant to be a "super appeal." Grinstead, 845 N.E.2d at 1031. Here, there was evidence presented that Adkins was in possession a large number of stolen items, including furniture and knick-knacks belonging to Grittner, a motorcycle engine belonging to Bingham, and a laser surveying transit belonging to Diamond Equipment.

Police also found a briefcase that, curiously, contained a large number of pieces of identification belonging to many different people. With respect to Grittner's belongings, there was evidence Adkins received them from an individual who simply showed up at his door with those items; Adkins did not purchase them from a retail establishment of some kind.

In other words, there was evidence in this case that large numbers of stolen items happened to turn up at Adkins's residence and that at least some of those items were obtained under unusual circumstances. Appellate counsel chose not to attack the sufficiency of the evidence supporting these two Class D felony receiving stolen property convictions. Instead, he focused his attention on the Class B felony conviction for manufacturing methamphetamine. That conviction resulted in a sentence of forty years, or most of Adkins's fifty-year sentence—a base sentence of ten years enhanced by thirty years for the habitual offender finding. Given our highly deferential standard of review for claims of insufficient evidence, the unusual circumstances surrounding Adkins's possession of multiple stolen items, and the relative insignificance of these two Class D felony convictions as compared to the conviction that appellate counsel did challenge, we cannot say appellate counsel made an unreasonable strategic decision in declining to challenge the sufficiency of the evidence for the receiving stolen property convictions.

Turning to the two RICO convictions, however, we conclude Adkins has met his burden of establishing that appellate counsel was ineffective for not challenging the sufficiency of the evidence to support these convictions. As charged here, the State was required to prove that Adkins, through a pattern of racketeering activity, knowingly or

intentionally maintained, either directly or indirectly, an interest in or control of property or an enterprise. See I.C. § 35-45-6-2(2). The alleged underlying racketeering activity for the two RICO convictions were receiving stolen property and manufacturing methamphetamine. Thus, the State was required to prove that Adkins received stolen property, namely Grittner's property and the laser transit, in order to maintain an interest in or control of property or an enterprise, and manufactured methamphetamine to the same end.

We see no evidence in the record of an "enterprise" maintained by Adkins's pattern of receiving stolen property and manufacturing methamphetamine. An "enterprise" is defined by statute as:

> (1) a sole proprietorship, corporation, limited liability company, partnership, business trust, or governmental entity; or
>
> (2) a union, an association, or a group, whether a legal entity or merely associated in fact.

I.C. § 35-45-6-1. "[T]he hallmark of an enterprise is structure. A RICO enterprise is an ongoing group of persons associated through time, joined in purpose, and organized in a manner amenable to hierarchical or consensual decision-making." Waldon v. State, 829 N.E.2d 168, 176 (Ind. Ct. App. 2005), trans. denied (citations omitted). To be an "enterprise," there must be "an ascertainable structure distinct from that inherent in a pattern of racketeering." Id.

The only possible "enterprise" in this case was Adkins's motorcycle repair business. However, the State did not demonstrate any connection between this business

and Adkins's receipt of stolen property and manufacturing methamphetamine.[2] There was no evidence, for example, that Adkins received any proceeds from that illegal activity, much less that any such proceeds were funneled into the motorcycle repair business. The fact that other people might have had access to Adkins's garage where the methamphetamine was manufactured is a far cry from evidence of a structure needed to establish the existence of a RICO enterprise. Cf. id. at 176-77 (holding there was sufficient evidence of a RICO enterprise where the defendant "was the ringleader of a group of individuals organized to carry out crime."). There also is no evidence that Adkins obtained or maintained an interest in any property because of his receiving stolen property or manufacturing methamphetamine.

In sum, the State might have proven here that Adkins engaged in a pattern of racketeering activity by repeatedly receiving stolen property or manufacturing methamphetamine, but it presented no evidence of an "enterprise" supported by that activity or property obtained because of it. We conclude it was unreasonable for appellate counsel to overlook this complete absence of evidence on an element of both RICO charges. Unlike the receiving stolen property convictions, where some inference that Adkins knew the property was stolen may arise from the evidence, there is no evidence on an essential element of the RICO charges. Also, appellate counsel presented only one issue on direct appeal, and so there should not have been a concern regarding

[2] The State also charged and convicted Adkins of receiving stolen auto parts, which specifically alleged the theft and receipt of Bingham's motorcycle engine; this charge was not alleged to be racketeering activity in either of the RICO counts. Additionally, proof of only one motorcycle engine theft does not constitute a "pattern" of racketeering activity; such a "pattern" requires proof of two or more incidents. See I.C. § 35-45-6-1.

the length of the brief or raising "too many" issues on appeal. We also believe that had this issue been presented on appeal, we would have reversed both RICO convictions for insufficient evidence, which also necessarily would prevent any retrial on those charges. See Jaramillo v. State, 823 N.E.2d 1187, 1190 (Ind. 2005), cert. denied. Thus, we conclude appellate counsel provided ineffective assistance by not challenging the sufficiency of the evidence supporting the RICO convictions.

**Conclusion**

Adkins has failed to establish that he received ineffective assistance of trial counsel. Appellate counsel was partially effective, but ineffective for not challenging the sufficiency of the evidence supporting Adkins's RICO convictions. We reverse the denial of post-conviction relief to the extent of directing that the RICO convictions be reversed and their accompanying sentences be vacated, but otherwise affirm the denial of post-conviction relief.

Affirmed in part and reversed in part.

NAJAM, J., and RILEY, J., concur.